

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

ORIGINAL

77-4142

United States Court of Appeals

For the Second Circuit.

MIGUEL SIMMS,
Petitioner-Appellant,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

APPEAL FROM AN ORDER OF THE NATIONAL LABOR RELATIONS
BOARD.

BRIEF FOR PETITIONER-APPELLANT.

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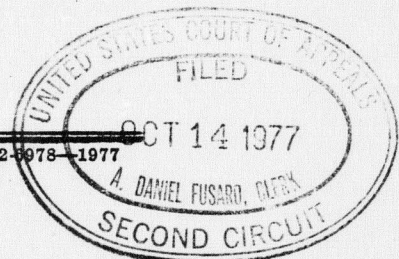


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STATEMENT

This is an appeal from an order of the National Labor Relations Board ("NLRB") which adopted the recommended order of an Administrative Law Judge ("the Judge") dismissing a complaint based upon charges filed by Miguel Simms ("Simms") against Local 100 of the Transport Workers Union of America, AFL-CIO ("Local 100"). Simms' charges alleged that Local 100 engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the National Labor Relations Act ("the Act"). The substance of those charges were that a Local 100 organizer, Kevin McGarvey ("McGarvey") filed intraunion charges against Simms alleging that Simms had filed unfair labor practice charges with the NLRB against Local 100. A hearing was conducted by a Sub-Committee of Local 100 with reference to McGarvey's charges. At that same time another series of charges were considered which had been filed against Simms by Local 100 Section Chairman Cosmo DeAlesio ("DeAlesio") and the Section Recording Secretary Robert Martin ("Martin"). Simms refused to present a defense to the DeAlesio and Martin Charges for the reason that they lacked specificity and did not afford him the opportunity to prepare a defense. Simms requested a statement of the ultimate facts of these charges and an adjournment to prepare his defense. Simms' request was denied and he left the hearing which then proceeded in his absence to consider the DeAlesio, Martin and McGarvey charges. Simms' union membership was revoked following that hearing.

Simms appealed to the International Committee On Appeals ("the International") which rescinded Local 100's decision. The International stated that, with respect to DeAlesio's and Martin's charges, they did lack specificity and were referred back for clarification and a new hearing. With respect to McGarvey's charges, the International stated that they violated the Act as Simms' right to complain to the NLRB is protected regardless of the merits of his complaint. However, the International concluded, pending the appeal Simms had been discharged from his employment for participating in a work stoppage and was thus ineligible for further union membership.

The decision of the Judge was that the violations of the Act by Local 100 in the course of the intermediate proceedings prior to the International's decision were irrelevant for the reason that those violations were corrected by the International and there was no evidence of prejudice in the interim arising out of the violations. Wherefore, the Judge dismissed the complaint. The instant appeal is from that dismissal.

POINT 1

Simms' rights were violated by Local 100. Through no fault of his own, the conclusion of the intraunion appellate process left Simms no better than he had been at the inception. Under these circumstances, the complaint should not have been dismissed.

The Judge stated that the issue in this case is, "...whether the various parts of an intraunion proceeding can be fragmented from the whole and each separately considered as a possible violation of the Act." His conclusion was that the complaint should be dismissed inasmuch as the violations by Local 100 were corrected by the International upon appeal. The Judge is wrong, for the following reasons.

A. The McGarvey charges.

Local 100 penalized Simms by expelling him from membership based upon the allegations of McGarvey concerning Simms having filed charges with the NLRB. The Judge has decided that such penalty is not a violation of the Act for the reason that Simms availed himself of the intraunion appellate process and was vindicated - but not reinstated - by the International. This decision condones an attempt by Local 100 to circumscribe Simms' access to the NLRB by subjecting him to the risk, anxiety and burdens of the intraunion appellate process in connection with a charge against him for having complained to the NLRB. The decision is wrong for the reason that any procedure which tends to deter a union member's access to the NLRB is a violation of the Act, regardless of whether such procedure is on the part of union or management, regardless of its motive and regardless of whether it was actually coercive.

In NLRB v. Illinois Tool Works, 153 F.2d 811 (2nd Cir., 1946) an employer sought to restrict a union's solicitation of members. The defense was that the employer's conduct was not intended to coerce employees nor did the evidence disclose that any employees were actually coerced. The court said that the test of coercion under Section 8(1) of the Act depends upon neither the employer's motive nor whether the coercion succeeded or failed. The test is whether it could reasonably be said that the conduct complained of tends to interfere with the free exercise of an employee's rights under the Act. In our case, Local 100 placed Simms in jeopardy for having gone to the NLRB. When they did so, it was notice to other members of the possible consequences attending a complaint to the NLRB against Local 100. If it could happen to Simms, it could happen to any other union member who filed charges with the NLRB. The same restrictions imposed upon employers regarding actions which reasonably tend to interfere with an employee's right to access to the NLRB, apply equally to unions. Garment Workers v. Labor Board, 366 U.S. 731 (1961). A statement of that principle is found in Local 138, International Union of Operating Engineers, 148 NLRB 679 (1964).

In the latter case, a union member filed unfair labor practice charges with the NLRB alleging that his union had discriminated against him by refusing to refer him to available employment. The Regional Director advised the member that a complaint would not issue and the member withdrew the charge. Nevertheless, the union's secretary complained to the union's grievance committee concerning the

member having filed NLRB charges. The member was tried in absentia when he failed to respond to the complaint and fined \$200. Subsequently he tendered his dues and they were rejected without payment of the accompanying \$200 fine. The member complained to the NLRB that the fine was an unfair labor practice within the meaning of Section 8(b)(1)(A) of the Act. The defense was that the latter Section does not preclude a union from prescribing its own rules regarding membership. The NLRB held that the imposition of a fine against a union member upon a charge that he complained to the NLRB concerning his union, is coercive and a restraint upon the exercise of his right to file such charges.

The Judge decided that the International corrected Local 100's violation of Simms' access to the NLRB. That decision is neither practical nor legally correct. Simms' pyrrhic success with the intraunion appellate process is not at all determinative of the issue of whether what occurred in this case might reasonably be said to cumulatively, tend to impede access to the NLRB. Justice Douglas pointed out in NLRB v. International Union of Marine And Shipbuilding Workers of America, 391 U.S.418 (1968), that an employee who must exhaust his intraunion appellate process in order to enforce his rights may become exhausted prior to exhausting his remedies. Simms proceeded with the intraunion appellate process and at the conclusion was no better off than at the inception.

B. The DeAlesio and Martin charges.

The DeAlesio and Martin charges, pursuant to which Simms was expelled from membership by Local 100, are set forth in the Statement (supra). The International reversed Local 100's decision dealing

with the DeAlesio and Martin charges and remanded. However, the International did not reinstate Simms' membership as he was, at that time, no longer employed in the industry. The Judge found that the foregoing result was not prejudicial to Simms. That part of the Judge's decision is wrong for the following reasons.

Local 100's findings against Simms on the DeAlesio and Martin charges and his expulsion based upon that adjudication were violations of 29 USC 411(a)(5). The decision of the International remanding for lack of specificity acknowledged that implicitly without citing the statute. However, pending the intraunion appeal, there was an involuntary charge in Simms' position, that is, Simms was fired. Consequently, the result of the International's remand was that Simms remained as punished as Local 100 had left him following his expulsion. The effect of the remand is only to afford a defense to the International and to Local 100 should Simms bring an action pursuant to 29 USC 412. Under these circumstances, the proper decision by the Judge would have been to look beyond the form of apparent statutory compliance afforded to Simms by the remand, to the substance of what had occurred to Simms while pursuing rights guaranteed to him by Congress. The proper course of the NLRB would have been to sustain the complaint and find that a violation of the Act had occurred in substance, if not in form. Although the NLRB failed to find thus, this Court may properly do so. Sands v. Abelli, 290 F.Supp. 677 at 681. (USDCSDNY, 1968).

CONCLUSION

Local 100's action on the McGarvey, DeAlesio and Martin charges violated the Act. The International's attempt to correct Local 100's errors did not afford any remedy to Simms who was fired while exhausting his intraunion appellate process. Under these circumstances, the complaint should not have been dismissed.

Respectfully submitted,

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